

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

THE APPLICATION OF)
NEW CINGULAR WIRELESS PCS, LLC,)
A DELAWARE LIMITED LIABILITY COMPANY,)
AND TILLMAN INFRASTRUCTURE LLC, A DELAWARE)
LIMITED LIABILITY COMPANY)
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC) CASE NO.: 2024-00284
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF GRAYSON)

SITE NAME: FALLING BRANCH

* * * * *

APPLICANTS’ RESPONSE TO INTERVENERS’ REQUESTS FOR INFORMATION

New Cingular Wireless PCS, LLC, a Delaware limited liability company, (“ATT”) and Tillman Infrastructure LLC, a Delaware limited liability company (“Applicants”), by counsel, hereby respond to the Interveners’ Requests for Information (“RFIs”) pursuant to the Order of the Public Service Commission of Kentucky (“PSC”) of January 7, 2025.

INTERVENERS’ QUESTIONS 1 AND 2 – COLLOCATION / WATER DISTRICTS, ETC.

Applicants *object* to Interveners’ Questions 1 and 2 of in that the United States Court of Appeals for the Sixth Circuit has specifically rejected a standard requiring applicants to endlessly search for different marginally better alternatives.¹ Accordingly, such inquiry and any PSC reliance on such inquiry, is irrelevant, violates substantive due process, is arbitrary, and could not provide a basis for a lawful decision under the federal

¹ *T-Mobile Cent., LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 808 (6th

Telecommunications Act. Compliance with PSC regulations, showing of a significant gap in coverage, a good faith search for a site, and the absence of evidence of a feasible and available less intrusive alternative site which would meet applicant's radio frequency objectives is sufficient to require approval of the application for a Certificate of Public Convenience and Necessity ("CPCN").

Response to Questions 1 and 2 of the RFIs is made by the Affidavit of Sherri Lewis, Radio Frequency Engineer for ATT attached hereto and incorporated by reference as **Exhibit A**. Significantly, Engineer Lewis points to the locations referenced by Interveners being far outside the relevant search area, or in one case, being a location which is needed *in addition* to the within proposed site. Thus, none is a better alternative. ATT is not required to collocate on any of the Interveners' listed sites and abandon the proposed site.

INTERVENERS' QUESTION 3: Without PSC approval, can the Joint Applicants raise the total height of the proposed tower at any point in the future?

Applicants *object* to Question 3 as a request for a *legal conclusion*. Nonetheless, Applicants direct Interveners to PSC Regulation 807 KAR 5:063, Section 3, and the Federal Spectrum Act and FCC Implementing regulations. Applicants reserve all rights under such existing state and federal law, and any amendments, to subsequently increase the height of the proposed tower if a CPCN is granted and the proposed tower is constructed.

807 KAR 5:063, Section 3 provides:

- (1) A utility planning to co-locate its antennas on an existing structure outside the jurisdiction of a planning unit, or to augment an existing structure outside the jurisdiction of a planning unit, to enable the utility to place its antennas on that structure shall file with the Executive Director of the Public Service Commission, in lieu of an application, written notice of its intent, including the name and address of the utility filing the notice, the name of the owner of the structure, the latitude and

longitude of the structure, and a description of the plan to augment or co-locate, if the proposed augmentation will neither:

- (a) Increase the height of the structure more than fifty (50) percent; nor
- (b) Result in new lighting requirements for a structure on which lighting is not currently required.

Section 3 applies to similarly situated towers throughout the Commonwealth. The pending CPCN application is for a tower at a specified height. Whether an approved and constructed tower might be extended in the future under Kentucky law is not at issue in this proceeding. This proceeding is over initial tower construction. Inquiry on the issue of subsequent height extension is highly speculative and irrelevant. Accordingly, Applicants further object to Request No. 3 on this basis.

Under Section 6409 of the federal Spectrum Act,² a state or local government must ministerially approve “any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station” within 60 days. The law defines “eligible facilities request” as any request for the modification of an existing wireless tower or base station that involves the collocation of new transmission equipment, removal of transmission equipment, or replacement of transmission equipment.

² 47 U.S.C. Section 1455(a).

FCC Regulations enacted in 2015³ define what types of modifications “substantially change” the physical dimensions of an eligible support structure and therefore escape its streamlined review provision. The FCC characterized its 2020 declaratory ruling⁴ as “clarifying” these regulations to resolve differing interpretations....” The 2015 FCC regulation states that for towers outside the public rights-of-way, a modification is a “substantial change” if “it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater.” (Emphasis added.)

The Spectrum Act, 2015 FCC Regulations, and the 2020 FCC Order applies to similarly situated towers throughout the United States. The pending CPCN application is for a tower at a specified height. Whether an approved and constructed tower might be extended pursuant to federal law in the future is not at issue in this proceeding. This proceeding is over initial tower construction. Inquiry on the issue of subsequent height extension is highly speculative and irrelevant. Accordingly, Applicants further object to Request No. 3 on this basis.

³ 47 C.F.R. 1.6100.

⁴ 35 FCC Rcd 5977 (FCC – June 10, 2020).

CERTIFICATE OF SERVICE

We hereby certify that the within was served on Interveners Roger & Janelle Nicolai, having a mailing address of 2663 Blue Bird Road, Falls of Rough, KY 40119, by First Class U.S. Postal Service Mail, postage prepaid, and via e-mail to janelle.nicolai@gmail.com on this 22nd day of January 2025.

Respectfully submitted,



David A. Pike
and



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EXHIBIT A

AFFIDAVIT OF SHERRI LEWIS

Come now the affiant, Sherri Lewis, RAN (Radio Access Network) Engineer for New Cingular Wireless PCS, LLC, and after first having been duly sworn on oath states the following facts are true and correct:

1. I have reviewed the existing structures listed in the information request dated January 10, 2025, filed in PSC Case Number 2024-00284.
2. All of the existing structures listed in the information request are located one mile or more outside the search area for the proposed Falling Branch wireless communications facility site.
3. Collocation of New Cingular Wireless PCS, LLC's facilities on these existing structures is not a viable option for the Falling Branch site because such collocation would not result in wireless service coverage that will remedy the New Cingular Wireless PCS, LLC significant coverage gap that exists in the subject area.
4. While collocation on the structure identified as "37°37'09"N, 86°26'17"W (Erected 2024, Post Docket #2021-00398)" will not remedy the New Cingular Wireless PCS, LLC coverage gap that the Falling Branch site is designed to address, New Cingular Wireless PCS, LLC does plan to collocate on this existing tower to provide and improve coverage in the greater area. Accordingly, collocation on this structure is needed in addition to construction of the Falling Branch site and is not an alternative to the Falling Branch site.
5. Further the affiant sayeth naught.

AFFIANT:

Sherri Lewis Date: 1/21/25

STATE OF Indiana)
 COUNTY OF Vanderburgh)



AFFIANT ACKNOWLEDGEMENT

On this, the 21 day of January, 2025 before me, the subscriber, a Notary Public in and for the above state, personally appeared to me **Sherri Lewis**, and in due form of law, acknowledged, subscribed, and swore that she executed this instrument as her voluntary act and deed. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal in said County and State on the day and year last above written.

Sara E Hardin
 Notary Public, State at Large

My commission expires: February 17, 2032